STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of Adoption of RIO MARCELLA BORGHESE, Minor.

SALLY BORGHESE,

Petitioner-Appellant,

v

MICHIGAN CHILDREN'S INSTITUTE,

Respondent-Appellee.

UNPUBLISHED
July 26, 2007

No. 274337
Kent Circuit Court
Family Division
LC No. 06-021909-AM

Before: Murphy, P.J., and Zahra and Servitto, JJ.

PER CURIAM.

Petitioner appeals a trial court order that (1) denied her motion to require respondent to grant her consent to adopt the minor child, her granddaughter, and (2) dismissed her petition to adopt the child. For the reasons set forth below, we affirm.

I

Petitioner contends that the trial judge, Judge Kathleen A. Feeney, was personally biased against her on the basis of the judge's participation in prior child protective proceedings involving the child, during which the judge removed the child from petitioner's temporary custody. Whether the undisputed conduct of a judge qualifies as impartial pursuant to MCR 2.003(B) involves a legal question, which this Court considers de novo. *Bloomfield Charter Twp v Oakland Co Clerk*, 253 Mich App 1, 18; 654 NW2d 610 (2002); *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 596; 640 NW2d 321 (2001).

To establish a judge's personal bias or prejudice, a litigant must overcome a heavy burden of judicial impartiality. *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). The litigant must demonstrate that the judge possessed an actual, personal, and extrajudicial bias against her. *Id*. at 495-496. "Judicial rulings, in and of themselves, almost never constitute a valid basis for a motion alleging bias, unless the judicial opinion displays a deep-seated favoritism or antagonism that would make fair judgment impossible." *Gates v Gates*, 256 Mich App 420, 440; 664 NW2d 231 (2003) (internal quotation omitted). Similarly, "[o]pinions formed by a judge on the basis of facts introduced or events occurring during the course of the current proceedings, *or of prior proceedings*, do not constitute bias or partiality

unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Schellenberg v Rochester, Michigan, Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998) (emphasis added).

Judge Feeney conducted a dispositional hearing in prior proceedings to terminate parental rights to the child, and she ordered the child's removal from petitioner's temporary custody. This participation, standing alone, does not disqualify the judge in this subsequent adoption proceeding. *Schellenberg*, *supra* at 39. The record of this adoption case does not contain a transcript of the prior dispositional hearing in the termination proceedings, and petitioner's argument on appeal fails to allege or even suggest that Judge Feeney's prior ruling revealed some "deep-seated favoritism or antagonism that would make fair judgment [in this case] impossible." *Gates*, *supra* at 440; see also *Armstrong*, *supra* at 597. Petitioner's primary contention is that Judge Feeney took into account hearsay evidence critical of petitioner, but the rules of evidence, including the general prohibition against hearsay, do not apply during dispositional hearings conducted under the juvenile code. See MCR 3.973(E)(1) and MCR 3.975(E).[1]

Petitioner also criticizes Judge Feeney for considering here her prior ruling at the dispositional hearing. However, after carefully reviewing the record, it is apparent that Judge Feeney's reference to her prior ruling removing the child from petitioner's temporary custody occurred only in the course of her preliminary summary of the underlying facts and procedural events that had brought the adoption matter before the court. Judge Feeney then went on to discuss and analyze the testimony and other evidence presented during the § 45 hearing. In summary, the record contains no suggestion of bias or partiality arising from the judge's preliminary reference to the prior child protective proceedings.

II

Further, petitioner says the trial court unfairly limited the scope of the § 45 hearing to issues related to respondent's grounds for denying her petition to adopt the child. This issue involves statutory construction, a legal question that this Court considers de novo. *Bloomfield Twp*, *supra* at 9. Although petitioner did not raise this issue before the trial court, we may address this legal question for the first time on appeal. *Smith v Foerster-Bolser Constr, Inc*, 269 Mich App 424, 427; 711 NW2d 421 (2006).

At the commencement of the hearing, the trial court quoted from MCL 710.45, regarding the appropriate scope of a § 45 hearing:

> (2) If an adoption petitioner has been unable to obtain the consent required by section 43(1)(b), (c), or (d) of this chapter, the petitioner may file a motion with the court alleging that the decision to withhold consent was arbitrary

[1] With regard to the hearsay argument, petitioner cites only the inapposite case of *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004), in which the United States Supreme Court discussed the applicability of the Confrontation Clause in the context of criminal proceedings, not the dispositional phase of child protective proceedings.

and capricious. A motion under this subsection shall contain information regarding both of the following:

(a) The specific steps taken by the petitioner to obtain the consent required and the results, if any.

(b) The specific reasons why the petitioner believes the decision to withhold consent was arbitrary and capricious.

* * *

(7) *Unless the petitioner establishes by clear and convincing evidence that the decision to withhold consent was arbitrary and capricious, the court shall deny the motion described in subsection (2) and dismiss the petition to adopt*. [Emphasis added.]

The trial court also quoted *In re Cotton*, 208 Mich App 180, 184-185; 526 NW2d 601 (1994), in which this Court discussed the scope of a trial court's review during a § 45 hearing:

[T]he focus is not whether the representative made the "correct" decision or whether the probate judge would have decided the issue differently than the representative, but whether the representative acted arbitrarily and capriciously in making the decision. Accordingly, the hearing under § 45 is not, as petitioners seem to suggest, an opportunity for a petitioner to make a case relative to why the consent should have been granted, but rather is an opportunity to show that the representative acted arbitrarily and capriciously in withholding that consent. It is only after the petitioner has sustained the burden of showing by clear and convincing evidence that the representative acted arbitrarily and capriciously that the proceedings may then proceed to convincing the probate court that it should go ahead and enter a final order of adoption.

Because the initial focus is whether the representative acted arbitrarily and capriciously, the focus of such a hearing is not what reasons existed to authorize the adoption, but the reasons given by the representative for withholding the consent to the adoption. That is, if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent even though another individual, such as the probate judge, might have decided the matter in favor of the petitioner. Rather, it is the absence of any good reason to withhold consent, not the presence of good reasons to grant it, that indicates that the representative was acting in an arbitrary and capricious manner.

For the above reasons, we reject petitioners' argument that the trial court erred in focusing the hearing on the reason for the withholding of the consent. [Emphasis added.]

The record reflects that the trial court plainly understood the scope of review set forth in MCL 710.45(7) and properly limited the hearing evidence, including petitioner's testimony, to matters "relevant to the decision-maker's reasons for withholding consent." *Cotton*, *supra* at 184-185. Furthermore, petitioner identifies on appeal no specific additional testimony or other evidence that she wished to provide during the § 45 hearing.

To the extent that petitioner characterizes as unfair that the trial court relied on events occurring at the prior dispositional hearing, as discussed previously, the court merely referred to the prior child protective proceedings to summarize the underlying facts and procedural history of the case.[2]

III

Petitioner additionally raises many challenges related to the quantity and strength of evidence supporting the decision of respondent's superintendent, William Johnson, to deny consent to her adoption petition. Petitioner lists 11 questionable items of testimony or occurrences during the § 45 hearing, which we will address in the order presented.

A

Petitioner complains that although superintendent Johnson claimed to generally review the investigation-related papers submitted to him when making decisions concerning adoption petitions, he failed to consider references and other documentation that petitioner submitted. But petitioner's argument mischaracterizes the record. Johnson testified that in reaching his decision to deny petitioner consent to adopt the child he took into account a March 2006 assessment by Catholic Social Services (CSS) recommending that respondent grant petitioner consent to adopt, a November 2004 relative foster home assessment that approved the child's temporary placement with petitioner, at least four personal reference letters describing petitioner's ability to care for the child, and a several-hour meeting with petitioner, her counsel, and a supporter.[3]

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[2] Petitioner's argument appears critical of the trial court's observation that she "had the opportunity while on the stand during the hearing to state . . . [petitioner's] side of the story." (Petitioner's brief on appeal, 11.) The trial court in fact recognized that petitioner had several opportunities to relay her position:

> I know there has [sic] been some statements made by Ms. Sally Borghese that she did not have a chance to tell her side of the story. She had an opportunity while she was on the stand here. It's my understanding she also met with . . . the CASA to explain her side and also had an opportunity to do so when she met with Mr. Johnson, MCI supervisor, and also had an opportunity when she was evaluated by Catholic Social Services. I think there were plenty of opportunities for her side of the story to be told.

[3] Because petitioner's counsel did elicit Johnson's acknowledgement that before making a decision regarding petitioner's adoption petition, he recalled seeing several letters attesting to "her ability to care for Rio," petitioner's argument that she received ineffective assistance of counsel lacks merit.

With respect to petitioner's related contention that Johnson improperly "weigh[ed] in personally . . . on decisions," Johnson explained that he weighed in personally "to some degree," but only in accordance with the priorities identified in respondent's adoption guidelines. To the extent that petitioner bemoans Johnson's ability to exercise judgment in granting or denying consent to adopt, the Legislature vested him with this authority, and this Court will not question the Legislature's wisdom in this regard. See MCL 400.203 (providing that "the superintendent of the institute has the power to make decisions on behalf of a child committed to the institute"); MCL 710.45(7).

B

Petitioner inaccurately suggests that Johnson made his decision without having full awareness of respondent's policy concerning adoption by fictive kin or an expression of willingness to adopt the child by Dr. Janice Wabeke, petitioner's doctor and friend. Johnson testified to his belief that before he rendered a decision regarding the child's adoption, he became aware that D.A. Blodgett, the agency that provided services in the child protective proceeding involving the child, was under investigation for failing to contact Dr. Wabeke, "who knew [petitioner] and knew Rio and who had . . . express[ed] her interest in . . . being considered for placement and also for adoption of Rio." Johnson also averred as follows that his ultimate decision concerning the child's adoption adhered to respondent's policy guidelines:

> I think the way I would describe our—our policy is . . . with families that are—that are interested in adopting a child . . . we certainly would—would try to give consideration to relatives and particularly relatives that have—the child has a relationship with. We would also give consideration to families that have been in a caregiver role for the child and particularly if foster families are—are at that time in a caregiver role. If there are other individuals that the child has a significant relationship with, I think there might be consideration given to . . . evaluating those families for adoption. But I would—I would say that if—if you already have families that the child has a strong connection with or is . . . involved with or is living with, that you would consider those families first and only if you—if you determine that neither of the[se] families was suitable or able to adopt, then you'd look for other families.

Thus, contrary to petitioner's representation, Johnson was aware of respondent's adoption guidelines, which did not favor placement with Dr. Wabeke because the child had resided in the same foster home for approximately nine months at the time of the hearing. Moreover, Dr. Wabeke's interest in adopting the child has no relevance to the bases for Johnson's denial of petitioner's adoption petition. *In re Cotton*, *supra* at 184-185.

C

Petitioner also suggests that Johnson should have suspected "that there was a predetermined arrangement to place the child with the foster family." But our review of the record simply does not substantiate any reasonable inference that anyone conspired to place the child with her foster family. Furthermore, as reflected in the previously-quoted passage in which Johnson discussed his weighing of respondent's adoption policy considerations, the policy

guideline in favor of adoptive placement with an existing foster family, where the child had resided for approximately nine months, trumped other potential policy considerations.

D

Petitioner offers the exaggeration that Johnson must have "believ[ed] that a 24/7 de facto parent should never disagree with or question motives of the social service agencies." The record amply documents that petitioner had difficulties interacting with caseworkers during the termination proceeding, difficulties that Johnson properly took into account in denying her adoption petition.

E

Petitioner criticizes Johnson for "dancing [around] the question of whether the child was damaged," and offering contradictory testimony in this regard. Our reading of the transcripts, however, reflects that while acknowledging that the child had endured no educational or physical neglect while in petitioner's care, Johnson consistently and repeatedly explained that petitioner's exposure of the child to contact with her substance abusive mother and an unstable lifestyle had harmed the child emotionally.

F

Petitioner again criticizes the extent of Johnson's investigation with respect to her adoption petition, specifically his failure to recognize that she always had been the child's "24/7 de facto parent." But petitioner disregards Johnson's testimony that "I think I was aware that [petitioner] had been—throughout Rio's life, that Sally had been, you know, involved and closely connected with Leda's efforts to raise Rio. I was aware that she was somebody who was a constant in—in Rio's life."

G

Petitioner mischaracterizes the record in maintaining that Johnson "chose to review only the report of a replacement [Court-appointed Special Advocate] CASA and not the CASA who had followed the case for many months." Sandra Schuiling testified that in her first effort as a CASA volunteer, she supervised many visits during the child's placement with petitioner, and opined that petitioner acted as a "[g]ood caretaker for" the child, with whom she shared a "very loving, wonderful relationship." Shuiling quit her volunteer position after about nine months, but averred that she wrote respondent a letter describing petitioner's positive relationship with the child. Although Schuiling recalled that she never met with Johnson to discuss petitioner's potential adoption, Johnson testified that he had knowledge of Schuiling's position:

> Well, I was aware that Sandy Schuiling had at one time been appointed as CASA for Rio. I did receive some communication I think from Sandy Schuiling. It's my understanding that there was a strong difference of opinion between what Ms. Schuiling recommended for Rio or how she thought the case was being managed and so on and I'm not sure of the exact circumstances, but she no longer works for the CASA program.

In summary, and contrary to petitioner's contention, the record reflects that Johnson took into consideration, or at least was aware of, Schuiling's favorable view of petitioner's care for the child.

H

In this last subissue, petitioner suggests that Johnson never reviewed a CSS study of her suitability for adoptive placement, as evidenced by the fact that he was unaware of her proposed support system for the child's care. A March 3, 2006 "Adoptive Family Assessment" prepared by the CSS adoption supervisor offered the following observations regarding petitioner's support systems:

> Sally indicates that she receives support from her friends and her church. She indicated that her friends are primarily composed of people involved in grass roots organizations that are trying to change the foster care system. These organizations are focused on the rights of parents and grandparents involved in the child welfare system.
>
> Sally indicated that if she died or became incapacitated, her primary physician, Dr. Janice Wabeke, would take Rio and provide for her. She feels that Dr. Wabeke's family is a strong one and she appreciates the manner in which Janice Warbeke [sic] and her husband Steve are raising their children.

Johnson expressly averred that in making his decision he reviewed the CSS assessment. In light of the facts that petitioner identified no family members as potential supporters and named as her primary support system only her doctor and friend of approximately six years, we do not view as unreasonable Johnson's characterization that petitioner had identified no "close and strong support system . . . that would be able to assist her in caring for the child."

In summary, substantial testimony at the § 45 hearing tends to establish the several reasons offered by Johnson for his decision to deny consent to petitioner's adoption of the child—primarily (1) the risk of continued emotional harm to the child arising from petitioner's ongoing contact with the child's mother, her confrontational behaviors toward agency workers who tried to assist her, and her unwarranted attacks on the child's foster parents, and (2) concerns regarding petitioner's age, income, and social support system. Although the record also contains some evidence that favorably describes petitioner's care of the child and recommends that she be allowed to adopt the child, "if there exist good reasons why consent should be granted and good reasons why consent should be withheld, it cannot be said that the representative acted arbitrarily and capriciously in withholding that consent." *In re Cotton*, *supra* at 185. After reviewing the record of the § 45 hearing, and the trial court's careful and detailed bench decision, we conclude that the trial court committed no clear error in finding that respondent did not arbitrarily and capriciously withhold consent, denying petitioner's motion, and dismissing her

petition to adopt the child. *Glennon v State Employees' Retirement Bd*, 259 Mich App 476, 478; 674 NW2d 728 (2003).[4]

IV

Lastly, petitioner raises three unpreserved claims of constitutional error that she has summarized in single sentences. Although unpreserved and improperly presented, we briefly address them. We consider constitutional questions de novo. *Bloomfield Twp, supra* at 30.

Regarding petitioner's Fourteenth Amendment Due Process claim, she inaptly cites *In re Mathers*, 371 Mich 516, 534; 124 NW2d 878 (1963), which mentions "the ancient policy of law and society of keeping children with their natural parents." Petitioner is not the child's natural parent, and *Mathers* makes no mention of any rights held by a purported de facto parent. More recent Michigan case law continues to recognize a Fourteenth Amendment right of due process for fit parents to have custody and control of their children, but likewise says nothing about the due process rights of a de facto parent. See *DeRose v DeRose*, 469 Mich 320, 328-332; 666 NW2d 636 (2003); *Keenan v Dawson*, ___ Mich App ___; ___ NW2d ___ (Docket No. 265725, issued June 5, 2007), slip op at 5.

Petitioner's First Amendment freedom of speech contention is difficult to address. Petitioner refers to no specific speech that respondent suppressed, or for which respondent or any other agency of the government punished her, and she also fails to raise any statements she might have self-censored fearing reprisal by a governmental entity. Petitioner may be referring to the instances when she picketed in front of the child's foster parents' house, or when she distributed fliers asserting that the Department of Human Services and the foster parents kidnapped the child, but during these instances her speech occurred unimpeded. Furthermore, petitioner's knowingly false "kidnapping" accusations qualify as libelous speech, which generally is not protected by either US Const, Am I or Const 1963, art I, § 5. *Burns v Detroit (On Remand)*, 253 Mich App 608, 620-621; 660 NW2d 85 (2002), mod 468 Mich 881 (2003).

Finally, the Fourth Amendment has no connection to this case because petitioner relates no instance in which any governmental entity unreasonably invaded her home.

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[4] We note that petitioner raises in her statement of questions presented an issue addressed in only one sentence in the conclusion portion of her appeal brief, that respondent's consideration of her age violates the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq*. By failing to adequately present this issue, petitioner effectively has abandoned it. *In re Wayne Co Treasurer Petition for Foreclosure of Certain Lands for Unpaid Prop Taxes*, 265 Mich App 285, 299-300; 698 NW2d 879 (2005). Furthermore, because Johnson explained that he did not disqualify petitioner from adopting the child on the basis of her age, but only took age into account with several other relevant considerations geared toward safeguarding the child's best interests, even assuming the CRA's applicability to respondent's actions, we reject that any violation of the CRA occurred. See MCL 710.21a(b) (declaring as a general purpose of the adoption code "[t]o provide procedures and services that will safeguard and promote the best interests of each adoptee in need of adoption and that will protect the rights of all parties concerned," but that "[i]f conflicts arise between the rights of the adoptee and the rights of another, the rights of the adoptee shall be paramount").

Affirmed.

/s/ William B. Murphy
/s/ Brian K. Zahra
/s/ Deborah A. Servitto